IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 20, 2006 Session

STATE OF TENNESSEE v. MICHAEL H. EVANS

Appeal from the Circuit Court for Humphreys County
No. 10275 Robert E. Burch, Judge

No. M2005-02048-CCA-R3-CD - Filed September 19, 2006

The Appellant, Michael H. Evans, was convicted by a Humphreys County jury of premeditated first degree murder and sentenced to life imprisonment. On appeal, Evans has raised three issues for our review: (1) whether the evidence is sufficient to support the conviction; (2) whether the court erred in not instructing the jury on self-defense; and (3) whether the court erred in not granting a petition for writ of error coram nobis based upon newly discovered evidence. With regard to Appellant's issues 2 and 3, we find no error. However, after review of the convicting evidence, we conclude that the proof fails to establish that the homicide was premeditated. Nonetheless, we conclude that the evidence is legally sufficient to support a conviction of second degree murder. Accordingly, we modify the judgment of conviction and vacate the sentence entered by the trial court. The case is remanded to the trial court for resentencing for second degree murder.

Tenn. R. App. P. 3; Judgment of Conviction is Modified and Sentence Vacated; Remanded for Sentencing

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Michael J. Flanagan (on appeal), Nashville, Tennessee; Kenneth Quillen (at trial), Nashville, Tennessee, for the Appellant, Michael H. Evans.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Lisa C. Donegan, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

During the early afternoon of July 7, 2002, the Appellant picked up Lisa Curtis intending to return to his trailer to watch television. However, prior to reaching the Appellant's residence, the pair stopped at the home of a mutual friend to pick up Shawn Anderson and the victim, Arthur

Schultz. Curtis was close friends with Anderson and was involved in an "off and on" romantic relationship with the victim. Curtis, Anderson, and the victim had been together the night before drinking and socializing. Upon their arrival, they found the victim passed out from the previous night of drinking, and it took several minutes to rouse him. Finally, the four departed in the Appellant's truck and proceeded to his trailer.

Upon their arrival, all continued to drink beer and whisky, with the exception of Curtis. A game arose between the men where they began throwing a knife, described by Curtis as a hunting knife with a six-inch blade, into the floor. The group then moved to the kitchen area where they sat at the dining table. They then progressed to playing a game whereby the victim, using the hunting knife, attempted to stab the hands of the other two men before the two could move their hands. At some point, the victim, who was exceedingly drunk, began poking at Anderson with a screwdriver. Anderson pushed the victim to the floor and took the screwdriver away. Anderson told the victim to calm down, and the victim said that he would. However, when Anderson let the victim up, he was still irritated by what had happened and proceeded to turn the Appellant's table over, which angered the Appellant. The Appellant then kicked the victim in the face and struck the victim several times with his fist, resulting in the victim's face bleeding. Anderson stepped between the Appellant and the victim and stopped the assault. The victim began to taunt the Appellant and told him "you're going to pay for this." At this point, the Appellant was in possession of the hunting knife that the men had used in the games. The victim was unarmed. The fighting upset Curtis, and she left the premises on foot. At the time she left, the three men were in the kitchen, and Curtis had observed no stabbing of the victim.

At some point, the victim entered the adjoining living room area, and Anderson assumed that everything had calmed down.[1] Upon entering the living room area, Anderson observed the victim seated on a love seat and realized that he was dead. The Appellant was also in the living area, although the State's proof fails to establish when the Appellant entered the area or how long he had been there. The Appellant proceeded to drag the victim outside and placed him in the bed of the truck. The Appellant and Anderson then drove to the pump house on the Duck River where the Appellant weighted the victim's body by tying a rock around his leg with an old automobile fan belt. The victim was then thrown into the river.

A short while later, Anderson phoned Curtis and informed her that no one had gotten hurt and that the victim had left the trailer on foot shortly after she did. Anderson asked Curtis if she wanted to return to the trailer, which she did. Upon her arrival, Curtis noticed blood smeared on the refrigerator and the back door. She again asked about the victim and was informed that he had left. However, later that evening the Appellant told Curtis that he had stabbed the victim and thrown him in the river, which Anderson verified. Although the jury heard proof that the Appellant stabbed the victim, no evidence was presented as to when or where the stabbing occurred in the mobile home. The Appellant told Curtis that it was an accident but that he could not let the victim tear up his

[1]The kitchen and living areas in the mobile home are in effect one open area, with an unobstructed view of the love seat from the dining table, which is located only feet away. See trial exhibits 5 and 11.

house. Curtis stayed at the trailer until the next morning, when she called someone for a ride and snuck out.

On the morning of July 11, 2002, the victim's body was found floating in the Duck River with the automotive fan belt still tied around his leg. The cause of death was later determined to be a stab wound to the chest. At approximately the same time the body was discovered, Curtis contacted the authorities and informed them of the events of July 7th. Following an investigation, Anderson was arrested and gave a statement to police. The Appellant was not immediately arrested, as he was out of town for work. However, he later surrendered to authorities.

On August 6, 2002, the Appellant and Anderson were jointly indicted by a Humphreys County grand jury for both first and second degree murder. At the July 2003 jury trial, the Appellant did not contest that he killed the victim; rather, he argued that the killing was justified upon grounds of self-defense. At the close of the proof, the trial court refused to submit a self-defense instruction, finding that self-defense was not supported by the evidence. Following the introduction of proof, the Appellant was found guilty of first degree murder, but Anderson was acquitted of all charges. The Appellant was subsequently sentenced to a term of life imprisonment.

After the conclusion of the jury trial, Appellant's trial counsel was approached by Anderson's trial counsel and was informed that Anderson had made a statement to him which indicated that the fight between the Appellant and the victim had continued outside the trailer and had concluded in the area where a screwdriver was found. This information was not presented at trial, as Anderson did not testify. At the motion for new trial hearing, Anderson testified that he informed TBI Agent Breedlove about the continuation of the altercation outside; however, Breedlove testified that Anderson never informed him of that fact.

The Appellant filed a motion for new trial on May 13, 2003, and a supplemental motion on January 2, 2005. As grounds for relief the Appellant asserted insufficient evidence, the failure to instruct on self-defense, and the newly discovered evidence of Anderson's statement, which the trial court treated as a writ of error coram nobis. After a hearing on the matter, the trial court denied the Appellant's motion by written opinion on August 19, 2005. This appeal followed.

Analysis

I. Sufficiency of the Evidence

First, the Appellant contends that the evidence is insufficient to support a verdict of guilty for his conviction of first degree murder. Specifically, the Appellant asserts that the evidence is insufficient with regard to the element of premeditation.

In considering the issue of sufficiency of the evidence, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Although a conviction may be based entirely upon circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974), in such cases, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63 (Tenn. 1985)). However, as in the case of direct evidence, the weight to be given circumstantial evidence and "the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

The Appellant was convicted of first degree murder which is defined in relevant part as "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2003). Premeditation necessitates "a previously formed design or intent to kill," *State v. West*, 844 S.W.2d 144, 147 (Tenn. 1992) (citations omitted), and "an act done after the exercise of reflection and judgment . . . [meaning] that the intent to kill must have been formed prior to the act itself." T.C.A. § 39-13-202(d). It also requires that the accused be "sufficiently free from excitement and passion as to be capable of premeditation." *Id.*

The element of premeditation is a question of fact to be determined by the jury from all the circumstances surrounding the killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Our supreme court has delineated several circumstances which may be indicative of premeditation, including declarations of the intent to kill, procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, infliction of multiple wounds, the making of preparations before the killing for

the purpose of concealing the crime, destruction or secretion of evidence, and calmness immediately after the killing. *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000).

At trial, the State called as its principal witnesses Lisa Curtis, TBI Agent Breedlove, Dr. Levy, the medical examiner, and TBI Agent Joe Minor. Neither the Appellant nor the co-defendant Anderson testified.

The undisputed proof established that although all three men present had been drinking throughout the afternoon, the victim was clearly the most intoxicated of the three. Lisa Curtis observed the physical altercation between the Appellant and the victim and heard the victim warn the Appellant that he would "pay" for his actions. At this point, the Appellant was in possession of the six-inch bladed knife. Upon Curtis' departure, the three men were still in the kitchen, and no stabbing had been observed.

Anderson's statement given to TBI Agent Breedlove and read to the jury, provided the following facts:

> I had been to [the Appellant's] trailer before a long time ago. We went into the back door. We sat around and then [the victim] started raising cane. I don't know what got [the victim] mad but he was going on with drunk ass talk.
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> He and [the Appellant] got into it. I broke them up. Then they got into it again and started fist fighting. [The Appellant] hit [the victim] all over. He got the best of him. [The victim] was bleeding out of his nose and mouth. I broke them up. [The victim] kept on mouthing, tell him [the Appellant], 'I'm going to get you back. I"m going to get you back.'
>
> I got a rag and wiped his face off. Lisa ran out of the trailer. I don't know where she went. I was over in the kitchen area. I thought everything was calmed down; and I walked back in the living room and saw [the victim] on the loveseat.
>
> I looked at [the victim] and saw that his eyes were open; and he was dead.[2] [The Appellant] was in the living room. I said, 'man, I've got to call 911'. He said, 'uh huh.' I said, 'man, he's dead.' I didn't see any blood from his body. It was like an instant and he was gone. I got scared and he got scared. I didn't see any weapon. I saw blood on [the victim's] tee shirt on the sides and all over.
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> I told [the Appellant], we've got to call 911. He kept on saying, no. [The Appellant] drug [the victim] by putting his arms under [the victim's] armpits and

[2] Curtis testified that Anderson told her that "he held [the victim's] head in his lap and watched him take his last breath."

> drug him through the back door. [The Appellant] put [the victim] in the back of his pickup truck. This was going on in the daytime.
>
> I got in the truck with [the Appellant]; and we went down to where the pump house is on the Duck River. [The Appellant] sat there in the truck and cried. He said he didn't mean to. He looked at me and said, 'my God, Shawn, man, I got to get rid of it.' He said a prayer. I remember seeing [the Appellant] tying [the victim's] body up. I wouldn't touch him. I don't know what he tied him up with. I didn't even look. [The Appellant] then dumped [the victim] into the river.

Dr. Levy, the state medical examiner, testified that the victim's cause of death was a four-inch "stab wound to his chest." Dr. Levy explained that death resulted from the fact that the victim bled to death. Dr. Levy testified that the postmortem examination indicated that the victim's body contained "about one-fifth of the amount of blood I would expect to find." With regard to the time of death, Dr. Levy opined that "[t]his sort of injury is a very serious injury; and death could have been as quick as, maybe, five or ten minutes; and could have been as long as an hour or even slightly longer."

TBI Agent Joe Minor testified that as a member of the Violent Crime Response Team he inspected the Appellant's residence for blood or blood stains. His inspection primarily involved the use of the chemical allumanol which, when placed in contact with hemoglobin, causes the blood stain to fluoresce, or glow, in darkness. Agent Minor explained that blood stains can still be detected notwithstanding a prior effort to clean or remove the staining. With regard to blood staining in the Appellant's residence, Minor testified that:

> There were many areas. There were areas on the kitchen table, an end table, the floors around the refrigerator, little breezeway leading out the back door, the laundry room, the mop that was in the bucket in the laundry room, all these areas including a doorknob, and wall gave positive presumptive test which indicated to me that blood could have been there at one time.

Minor further testified that he also visually observed blood stains on the refrigerator, the kitchen ceiling, and the trash can in the kitchen. With respect to the areas that "fluoresced," Minor related that "I've never really seen a reaction like that in nineteen years." With respect to the couch or love seat where the victim sat at his death, no evidence was presented that any blood staining was found on this item of furniture.

When questioned about whether the victim could "have been on that loveseat . . . without leaving some stain," Agent Breedlove responded:

> In my opinion, no, because there would have been some staining. I mean there was a conflict with his statement with him saying that he was bleeding on the loveseat and with looking at the loveseat being there wasn't any blood. There was

a conflict there. Either he is lying about where [the victim] was or, you know, that's the only thing because he was never on the loveseat.

The forensic proof established that the victim lost approximately four-fifths of his blood following the stabbing. No blood was found on the loveseat where the victim had been sitting for some undetermined period of time. A large amount of blood, however, was found in the kitchen. Moreover, Agent Breedlove testified that he doubted that the victim was on the love seat. Again, we note that there was no proof presented which establishes when or where the victim was stabbed. A conviction, or as applicable here, proof of a requisite element of the offense may not rest solely upon conjecture, guess, speculation, or a mere possibility. *See State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn. 1987). In order to convict of first degree murder, the State was required to prove the element of premeditation beyond a reasonable doubt. After careful review of the testimony of the above witnesses, we are unable to conclude that the element of premeditation has been established. Agent Breedlove and Dr. Levy's testimony conflicts with the State's theory that the Appellant was stabbed while on the love seat and bled to death as he sat there. Indeed, the greater proof, as related by Agent Minor, would support the conclusion that the victim was stabbed in the kitchen area. Under these circumstances, if the homicide did not occur on the love seat, there is no proof before us to support an interval of time "sufficiently free from excitement and passion" which would permit a finding of premeditation. Although a crime may be established by the use of circumstantial evidence alone, "a [web] of guilt must be woven around the defendant . . . from which facts and circumstances the [jury] could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *State v. Sexton*, 917 S.W.2d 263, 265 (Tenn. Crim. App. 1995) (emphasis added). In this case, the proof at trial, while supporting a reasonable inference that the stabbing could have occurred in the living room, equally supports a reasonable inference that the stabbing occurred in the kitchen when the Appellant was not "free from excitement and passion."

Moreover, upon viewing the evidence in the light most favorable to the State, no evidence was presented that the Appellant made any declarations of intent to kill the victim, made any preparations to conceal the offense prior to stabbing the victim, or had a previously formed design or intent to kill the victim. There was no showing of hostility between the two until the victim overturned the table. Furthermore, while the Appellant possessed the knife, the evidence does not indicate that the Appellant procured it for the purpose of killing the victim. Indeed, shortly before the murder, the victim was in possession of the knife while the three men played a game. Additionally, Anderson testified that both he and the Appellant were upset and crying after the murder occurred, which clearly does not indicate calmness after the killing.

The proof does establish that the Appellant used a deadly weapon upon an unarmed victim, as testimony indicated that Anderson had taken the screwdriver away from the victim prior to the altercation with the Appellant. However, that fact alone will not support a finding of premeditation. *State v. Tune*, 872 S.W.2d 922, 925 (Tenn. Crim. App. 1993).

It is undisputed that the two were engaged in a heated physical altercation initiated by the victim, evidencing a period of excitement and passion. Indeed, the confrontation between the two

men and the circumstances of the stabbing are not at all indicative of the "exercise of reflection and judgment." If the purpose to kill is formed in passion and executed before the passion cools, it is murder in the second degree, not murder in the first degree. *State v. Brown*, 836 S.W.2d 530, 539-40 (Tenn. 1992). Thus, the absence of planning, the absence of prior hostility, and the circumstances surrounding the manner of the killing all militate against proof of premeditation. Absent the element of premeditation, the Appellant's conviction for first degree murder cannot stand.

We conclude, however, under the facts of this case, that the evidence is sufficient to support a finding that the Appellant knowingly killed the victim, and, thus, committed second degree murder. *See* T.C.A. § 39-13-210(a)(1) (2003). Accordingly, we modify the Appellant's conviction to reflect a conviction of second degree murder and remand for sentencing for that offense.

II. Self-defense Jury Instruction

Next, the Appellant asserts that the trial court committed error by refusing to give a jury instruction on self-defense. The Appellant argues that, viewing the evidence in the light most favorable to him, the instruction was required because the proof established that more than one serious physical confrontation took place between him and the victim.

The defense of self-defense is expressly provided for in Tennessee and is defined, in relevant part, as follows:

> (a) A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

T.C.A. § 39-11-611(a) (2003).

The trial judge has a duty to give a complete charge of the law applicable to the particular facts of the case, including every issue of fact material to the defense if raised by the evidence. *State v. Sims*, 45 S.W.3d 1, 9 (Tenn. 2001). This duty includes "giving jury instructions concerning fundamental issues to the defense and essential to a fair trial . . . ." *State v. Anderson*, 985 S.W.2d 9, 17 (Tenn. Crim. App. 1997). To determine whether self-defense is fairly raised by the proof and must be instructed to the jury, "a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence." *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). As noted in the statute, an individual is justified in using force against another person when he or she reasonably believes (1) that death or serious bodily injury is imminent and (2) that the force used is immediately necessary

to protect against the other person's use or attempted use of unlawful force. T.C.A. §39-11-611(a) (2003).

When evidence supporting self-defense is admitted at trial, the question of whether or not an individual acted in self-defense is a factual determination to be made by the jury. *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). However, our law mandates that "[t]he issue of the existence of a defense is not submitted to the jury unless it is fairly raised by the proof." T.C.A. § 39-11-203(c) (2003). This court is instructed to interpret the above statute to read that "the defendant has the burden of introducing admissible evidence that a defense is applicable." *Id*., Sentencing Commission Comments.

In its order denying the motion for new trial, the trial court found that the issue was not raised by the proof. The proof established that the Appellant was armed with a knife while the victim was unarmed. Moreover, the record establishes that the Appellant both severely kicked and hit the highly intoxicated victim, with no evidence being presented of any blows struck by the victim. Moreover, the record reflects that the victim was in large part defenseless against the Appellant due to his level of intoxication. A thorough review of the record fails to reveal that the Appellant had a reasonable belief that the use of force was necessary to protect himself against the victim's use of unlawful force or that death or serious bodily injury was imminent. Thus, it was not error for the trial court to refuse to instruct the jury on self-defense.

III. Writ of Error Coram Nobis

Next, the Appellant asserts that the trial court erred by not granting his petition for writ of error coram nobis based upon the issue of newly discovered evidence. In his motion for new trial, the Appellant raised the issue of newly discovered evidence, namely the written statement given by Anderson to his attorney indicating that the fight had continued outside after the altercation in the kitchen had ended. The trial court correctly treated the issue as a petition for writ of error coram nobis, which it denied.

A writ of error coram nobis is an extraordinary remedy by which the trial court may provide relief from a judgment under narrow and limited circumstances. *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999). The remedy is available by statute to a criminal defendant in Tennessee. *See* T.C.A. § 40-26-105 (2003). This statute provides, in pertinent part:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

> The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

T.C.A. § 40-26-105. The "purpose of this remedy 'is to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment.'" *State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting *State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (1966)). The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. *Teague v. State*, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), overruled on other grounds by, *Mixon*, 983 S.W.2d at 671 n.13.

In order to be entitled to a new trial based upon newly discovered evidence, a defendant must show that he exercised due diligence, that the newly discovered evidence is material, and that it would likely change the result if produced and accepted by a jury. *See Newsome v. State*, 995 S.W.2d 129, 133 (Tenn. Crim. App. 1998). Additionally, the trial court must determine the credibility of the witnesses who testify in support of the petition. *Id*. at 134-35. If the trial court does not believe that the witnesses are credible, the court should deny the application. *Id*. Thus, upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the defendant, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

In its order denying the petition, the trial court found, in relevant part, as follows:

> Since the statement was made by a co-defendant, counsel for [the Appellant] could not have discovered it prior to trial. Reasonable diligence has been shown.
>
> . . . The effect of this statement is to impeach the statement of Anderson given to Agent Breedlove. Assuming *ab arguendo* that the new statement would be admissible for the purpose of impeaching the statement offered at trial, there remains a requirement which must be satisfied before a new trial may be granted on this newly discovered evidence.
>
> When it appears that the newly discovered evidence can have no other effect than to "discredit the testimony of a witness at the original trial, contradict a witness' statement or impeach a witness," the trial court should not order a new trial "unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a different result at trial would necessarily follow." *State v. Rogers*, 703 S.W.2d 166, 169 (Tenn. Crim. App. 1985).

> [The Appellant] insists that the fact that the fight continued outside establishes a continuing altercation and that the stabbing occurred during the altercation. He alleges that this fact would establish his claim of self-defense.
>
> The physical evidence introduced at trial does not support the version of events contained in Anderson's subsequent statements . . . . Blood was found in numerous places and in great quantity in the kitchen area of the trailer, on the back door, on the back porch and down the steps leading to the back yard. Blood was also found on [the Appellant's] pickup truck. Although the serologist for the T.B.I. examined the back yard area, no blood was found. The serologist did mention finding the tiller and a screwdriver but did not mention the finding of blood thereon. If a fight had occurred in the kitchen and the deceased was injured sufficiently to cause the quantity of blood in the kitchen . . . , it is obvious that a significant amount of blood would have been found in the area of the fight outside. None was found. Also, if the deceased has been wielding the screwdriver found on the tiller, it would have had blood on it. None was found. The post-trial testimony of Anderson is not believable.
>
> Thus, the impeaching evidence is not so strong and convincing as to require a different outcome at the trial.

We find nothing to support an abuse of discretion in the trial court's findings with regard to the credibility of the evidence or that the evidence would not have affected the result of the trial. We agree with the trial court that the evidence in question, Anderson's statement, was not shown to be material. The Appellant's argument that it would have bolstered his self-defense theory is misplaced. There was no physical evidence that the stabbing occurred outside or fingerprint or blood staining evidence which placed the victim in possession of the screwdriver at the time he was stabbed. This issue is without merit as the Appellant has failed to meet his burden of demonstrating that the newly discovered evidence would have resulted in a different judgment.

CONCLUSION

For the reasons set forth above, we vacate the Appellant's conviction for premeditated first degree murder and the accompanying sentence and modify the judgment of conviction to that of second degree murder. This cause is remanded to the trial court for entry of a judgment of conviction in accordance with this opinion and for resentencing consistent with the principles of sentencing.

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DAVID G. HAYES, JUDGE